Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Mr. Alain Gosselin,

complainant,

and

Seafarers' International Union of Canada,

respondent,

and

Desgagnés Marine Cargo Inc.,

employer.

Board File: 29991-C
Neutral Citation: 2013 CIRB 704
December 16, 2013

The Canada Industrial Relations Board (the Board), composed of Ms. Louise Fecteau, Vice-Chairperson, and Messrs. Daniel Charbonneau and Robert Monette, Members, considered this complaint.

Section 16.1 of the *Canada Labour Code (Part I Industrial Relations)* (the *Code*) provides that the Board may decide any matter before it without holding an oral hearing. Having reviewed all of the material on file, the Board is satisfied that the documentation before it is sufficient for it to determine this complaint without an oral hearing.

Parties' Representatives of Record

Mr. Christian Gosselin, for the complainant;

Mr. Gary H. Waxman, for the Seafarers' International Union of Canada;

Mr. Michel Denis, for Desgagnés Marine Cargo Inc.

These reasons for decision were written by Ms. Louise Fecteau, Vice-Chairperson.

I. Nature of the Complaint

[1] On May 10, 2013, Mr. Alain Gosselin (the complainant) filed a complaint with the Board pursuant to section 97(1) of the *Code*, in which he alleged that the Seafarers' International Union of Canada (the union) had breached its duty of fair representation under section 37 of the *Code*. More precisely, he maintained that the union had acted arbitrarily and in bad faith by refusing to take his grievance to arbitration.

II. The Uncontested Facts

[2] The union was certified in 1970 by the current Board's predecessor, the Canada Labour Relations Board, as the bargaining agent for a unit of employees of Transport Desgagnés Inc. comprising all unlicensed personnel working aboard the company's vessels. On December 20, 2002, Transport Desgagnés Inc. sent the union a letter in which it indicated the following:

> This is to inform you that a transaction has taken place between Transport Desgagnés Inc. and Desgagnés Marine Cargo Inc., whereby, effective January 1, 2003, the latter will be providing all unlicensed crews required for operations relating to the carriage of different cargo and dry bulk by sea.
>
> Desgagnés Marine Cargo Inc. has undertaken to hire the unlicensed employees for Transport Desgagnés Inc. represented by the Seafarers' International Union of Canada, to apply the collective agreement to them, and to act in all respects as the successor employer within the meaning of section 44 of the *Canada Labour Code*.
>
> We will, as soon as possible, prepare the necessary documentation to send jointly to the Canada Industrial Relations Board to inform it of the transaction in order that it may issue a new proper bargaining certificate.
>
> (translation)

[3] Of note is that such an application under section 44 of the *Code* was never made to the Board and so the bargaining certificate issued in 1970 was never amended.

[4] Desgagnés Marine Cargo Inc. (DMC or the employer) is a corporation incorporated under the *Canada Business Corporations Act* whose business is to provide the personnel required for the operation of general cargo vessels owned by Transport Desgagnés Inc. DMC is a subsidiary of Transport Desgagnés Inc.

[5] The union and DCM are party to a collective agreement covering unlicensed personnel. The agreement covers the period from April 1, 2011, to March 31, 2017. Under the provisions of that agreement, particularly article 5.06 thereof, DMC undertakes to hire the personnel required for its operations **through** the union offices. The procedure for hiring personnel is set out in article 5 (5.01 to 5.21) of the collective agreement between the parties. Article 5.11 states the following:

> 5.11 Before dispatching workers to work on one of the company's vessels, the union or the hiring hall official shall provide the company with full identification information in their regard along with their licenses, certifications, visas, seafarers medical fitness certificates, and all other documentation relevant to their employment (e.g. passports) required by the company, as well as sufficient information for the company to be able to enter into contact with them.
>
> In the event that the company requires personnel in addition to or in temporary or permanent replacement of permanent staff described on the seniority list referred to in article 9.05, the company shall inform the union, which shall arrange to refer duly qualified applicants to the company. The company shall advise the union as soon as possible of its acceptance or rejection of the applicant or applicants proposed by the union. On written request from the union, the company shall inform the union in writing of its reasons for refusing to hire an applicant. In such an event, the union shall provide the company with the name or names of a new applicant or new applicants, and so forth, until the company makes its selection. The rejection of an applicant shall not give rise to any right to a grievance procedure of any kind; further, a selected applicant shall be subject to the probation provided for in article 9.05 where the position to be filled is a permanent position.
>
> (translation)

[6] On or around March 6, 2013, the complainant submitted a job application to the union to work aboard the *Mélissa Desgagnés*. The union forwarded the application to DMC in connection with a relief position for a period of about 30 days starting on or around March 12, 2013. On or around March 6, 2013, DMC advised the union of its refusal to hire the complainant.

[7] On March 11, 2013, the complainant submitted a grievance form in relation to the employer's refusal to hire him to work on the *Mélissa Desgagnés*. On March 25, 2013, DMC indicated that the grievance was without merit for the following reasons:

> - Pursuant to the provisions set out in the second paragraph of article 5.11 of the collective agreement, "[t]he rejection of an applicant shall not give rise to any right to a grievance procedure of any kind...". This alone makes the grievance inadmissible.
>
> - Furthermore, please be informed that Mr. Alain Gosselin's personal record with the company contains some specific information that led to a final breakdown of the employment relationship between the parties in the past.
>
> (translation)

[8] According to DMC, the complainant's application was rejected because, in 2009, the complainant had falsified his Transport Canada medical certificate in order to be hired to work on one of the company's vessels.

[9] On April 25, 2013, the complainant met with the union vice-president regarding the union's handling of his grievance. At that meeting, the union informed the complainant that it would refuse to take his grievance to arbitration.

III. Parties' Positions

A. The Complainant

[10] The complainant submits that the union was negligent, made serious mistakes and acted in bad faith toward him. He does not deny what happened in 2009, but believes that he is now completely recovered and states that, since that time, he has received medical treatment and his health has been assessed by Transport Canada, which issued a new medical certificate in 2012.

[11] Both in his complaint and in his reply, the complainant alleges that the union failed to take the new medical certificate into account and that the union representative failed to provide him with any help in handling his grievance. In addition, the complainant alleges that the union did not take into account his explanations regarding what had happened in 2009 and his medical diagnosis at that time.

[12] The complainant alleges that he is entitled to hiring protection under the *Canadian Human Rights Act*, which prohibits discrimination based on temporary disability.

[13] The complainant further submits that the union failed to show any real willingness to represent him and argues that it was fixated on his supposed offence in 2009 even though it is

now 2013. He also criticizes DMC for applying a penalty four years after the fact and argues that the union did not consider his interests in this matter.

B. The Union

[14] The union submits that DMC was the one that refused to hire the complainant because he had falsified his medical certificate in the past in connection with a job application provided to the employer by the union. The union refers to the provisions of the collective agreement in effect with regard to the employer's right to refuse an application provided by the union and specifically calls attention to the provision that states that the employer's rejection of an applicant does not give rise to any right to a grievance procedure of any kind. It submits that the collective agreement therefore does not allow the union to refer such a decision by the employer to arbitration. It adds that a member in good standing such as the complainant may nonetheless be eligible for other positions with other companies under contract.

[15] In addition, the union indicates that its constitution provides for a grievance procedure if a member considers that the union has acted in a manner that adversely affected him or her. It states that it is the member's responsibility to file such a grievance within the time limit prescribed in order to obtain a review of the union's conduct in the dispatch process.

[16] The union submits that, in this matter, it never refused to review the complainant's file; on the contrary, it took all necessary steps with the employer to obtain and analyze all of the documentation and explanations regarding the employer's refusal to hire the complainant. The union adds that its conduct in this matter was far from arbitrary, as alleged by the complainant, and that it gave the complainant's case all the attention required under the circumstances. The union considers that it acted in conformity with all the obligations provided for in the collective agreement between the parties and the national hiring regulations in effect and that it duly fulfilled its duty of fair representation toward the complainant, in accordance with the Board's jurisprudence. It submits that the complaint is without merit in fact and in law.

[17] In closing, the union alleges that section 37 of the *Code* may not apply to the circumstances of this matter, given the lack of any employment relationship between DMC and the complainant

and the fact that there is no right to a grievance under the collective agreement in relation to a refusal to hire someone.

C. The Employer

[18] DMC asks that the Board dismiss the complainant's claims for remedy. It alleges, among other things, that the complainant has not worked for it since 2005.

IV. Analysis and Decision

[19] The essence of this complaint relates to the fact that the union refused to take the grievance against DMC's rejection of the complainant's application to arbitration. Section 37 of the *Code* provides as follows:

> 37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them.

[20] The union's duty of fair representation comes from its exclusive authority as bargaining agent to represent all employees in the bargaining unit. That duty is expressed as a prohibition against the union acting in a manner that is in bad faith or is arbitrary or discriminatory in the representation of the employees in the unit.

[21] At the time DMC refused to hire him, the complainant did not have the status of employee within the meaning of the collective agreement. Rather, his status was that of an applicant proposed to the employer by the union to fill a position on a vessel.

[22] In *Powell*, 2000 CIRB 97, the Board specified that, when dealing with a complaint pursuant to section 37 of the *Code*, there are two conditions that must be met:

- there must be a bargaining agent for a bargaining unit; and
- there must be an employee in the unit who has rights under the collective agreement.

[23] In this matter, the union is the bargaining agent for the previously defined bargaining unit at DMC.

[24] However, the evidence in this matter reveals that the complainant was not an employee who was a member of the bargaining unit in question. The complainant was not employed by DMC at the time of the events at issue here. In fact, according to DMC, the complainant did not work for it in 2013 and his last period of employment with the corporation dates back to 2005. Additionally, DMC had already refused to hire the complainant in the past, in 2009.

[25] Furthermore, the union indicated that the collective agreement does not provide for a right to a grievance in the event that the employer refuses to hire an applicant. Consequently, the complainant's allegation against the union does not relate to union representation in respect of a right of the complainant under the collective agreement.

[26] The complainant was not employed by DMC and therefore was not an employee who was a member of the bargaining unit with rights under the collective agreement within the meaning of section 37 of the *Code*.

[27] In *Haley*, 1999 CIRB LD 77, the Board had before it a similar issue and it found that the complainant did not have the required standing to bring a complaint under section 37 of the *Code* since the complainant was not a member of the bargaining unit, had no rights under the applicable collective agreement and was no longer working for the employer:

> The wording of section 37 of the *Code* clearly shows that, for its applicability, one has to be a member of a relevant bargaining unit with rights under an applicable collective agreement. The evidence established that the threshold requirements of section 37 were not met since the complainant was not, at the time he filed his section 37 complaint, a member of ILA, Local 269. The evidence also established that, at the time Mr. Haley filed his section 37 complaint, he was no longer working for the employer and he was not an employee in the bargaining unit with rights under the applicable collective agreement.
>
> Consequently, the Board found that the complainant lacked the required standing to bring a complaint alleging violation of section 37 of the *Code* and dismissed the complaint accordingly.
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> (pages 2–3)

[28] For the foregoing reasons, the Board finds that the complainant did not have the required standing to bring a complaint alleging violation of section 37 of the *Code*.

[29] That said, the complainant is not without any rights under the *Code*. In fact, when the union controls the referral of persons to employment, as in this case, it has certain obligations under section 69 of the *Code*, which reads as follows:

> 69.(1) In this section, "referral" includes assignment, designation, dispatching, scheduling and selection.
>
> (2) **Where, pursuant to a collective agreement, a trade union is engaged in the referral of persons to employment, it shall establish rules for the purpose of making such referrals and apply those rules fairly and without discrimination.**
>
> (3) Rules applied by a trade union pursuant to subsection (2) shall be kept posted in a conspicuous place in every area of premises occupied by the trade union in which persons seeking referral normally gather.
>
> (emphasis added)

[30] However, in this matter, the complainant does not allege that the union applied the rules for making referrals in a discriminatory manner. Rather, he alleges that the union's refusal to pursue his grievance any further was arbitrary, discriminatory and in bad faith.

[31] In *Brewer*, 2000 CIRB 54, a decision affirmed by the Federal Court of Appeal in *Brewer* v. *Halifax Longshoremen's Assn.*, 2002 FCA 42, the Board described the review it conducts and the limits placed on it in reviewing the union's conduct respecting complaints under section 69 of the *Code*. In that matter, the complainants alleged that the rules for placement on the reserved bullpen list were flawed and were not applied equally and consistently to all applicants and were therefore not applied fairly and without discrimination.

[32] The Board explained its role under section 69 as follows:

> [47] ... it is not the Board's role to assess whether the rules in question here are good rules, the best rules or whether other rules would have been more appropriate. Clearly, the Board's only role is to evaluate the process by which the union developed and applied the Rules to determine whether, in its view, the Rules were fair and non-discriminatory and were administered in a fair and non-discriminatory manner.

[33] In the matter now before the Board, the union and DMC are party to a collective agreement under the terms of which the union manages a hiring hall for unlicensed personnel for DMC.

[34] Even if the complainant had alleged a violation of section 69 of the *Code*, there is no evidence in the record that the process used by the union to develop or apply rules respecting referral was discriminatory. Further, there is no evidence in the record that the union applied the referral rules in a discriminatory manner in this case.

[35] The union's decision not to pursue the complainant's grievance any further was based primarily on its interpretation of the collective agreement. The union concluded that the grievance had no chance of success given the provision of the collective agreement to the effect that rejection of an applicant does not give rise to any right to the grievance procedure. The Board notes in this regard that it ultimately falls to the bargaining agent to interpret the provisions of the collective agreement (see *Mallette*, 2012 CIRB 645).

[36] Some of the complainant's allegations relate to the merit of DMC's decision to refuse to hire him. In particular, the complainant maintains that DMC acted in a discriminatory manner, basing its refusal on his temporary health problems.

[37] However, the Board will not consider the practices or conduct of the employer in dealing with a complaint under section 37 of the *Code* (see *Cadieux*, 2012 CIRB 656, application for reconsideration dismissed in *Cadieux*, 2013 CIRB 676). In the Board's view, the same applies to a complaint under section 69 of the *Code*.

[38] Under the circumstances, the Board dismisses the complaint.

[39] This is a unanimous decision of the Board.

Translation

Louise Fecteau
Vice-Chairperson

Daniel Charbonneau
Member

Robert Monette
Member